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No. 80-311

In the Supreme Court of the United States

OCTOBER TERM, 1980

ARTHUR ANDERSEN & CO., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner seeks review of the court of appeals' dismissal of its appeal from an order of the district court enforcing an Internal Revenue summons on the ground that the case became moot upon petitioner's compliance with the summons.

The pertinent facts may be summarized as follows: On November 14, 1977, a special agent of the Internal Revenue Service issued a summons to petitioner requesting production of records pertaining to the tax liabilities of Good Hope Industries, Inc. Petitioner refused to produce certain documents referred to collectively as the "tax accrual work papers" (Pet. App. A-10 to A-12, A-18). These documents were prepared by petitioner to evaluate Good Hope's reserve for taxes, and contingent liability account shown on its balance sheet (Pet. App. A-3). The

district court ordered the summons enforced[1] and refused to stay its order pending appeal (Pet. App. A-28, A-42). Both petitioner and Good Hope filed notices of appeal and moved to stay the order pending appeal. The court of appeals denied a request for a stay (Pet. App. A-43 to A-44). Subsequently, Mr. Justice Brennan likewise denied Good Hope's motion for a stay (Pet. App. A-46). Petitioner thereupon complied with the summons at issue by producing the requested documents. The Service made copies and returned the originals to petitioner (Pet. App. A-3). In light of petitioner's compliance with the summons, the court of appeals dismissed petitioner's appeal upon the ground that the case was moot (Pet. App. A-8 to A-9).

1. Petitioner contends (Pet. 7-9) that the court of appeals erred in dismissing its appeal as moot even though it removed the only issue in the case by complying with the summons. But as this Court recently observed, "a federal court has neither the power to render advisory opinions nor 'to decide questions that cannot affect the rights of litigants in the case before them.' " *Preiser* v. *Newkirk*, 422 U.S. 395, 402 (1975), quoting *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971). Here, the petition to enforce the summons sought petitioner's production of certain documents. Pursuant to the order of the district court, those documents have been produced. Accordingly, the court below correctly held that there is no longer a live dispute between petitioner and the government and that the case is moot. *United States* v. *Deak-Perera Banking Corp.*, 610 F. 2d 89 (2d Cir. 1979); *Kurshan* v. *Riley*, 484 F. 2d 952 (4th Cir. 1973); *United States* v. *Hankins*, 565 F. 2d 1344 (5th Cir. 1978); *United States* v.

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[1] The taxpayer, Good Hope Industries, Inc., was permitted to intervene in the summons enforcement proceedings.

Patmon, No. 75-2246 (6th Cir. Sept. 16, 1980); *United States* v. *Olson*, 604 F. 2d 29 (8th Cir. 1979); *SEC* v. *Laird*, 598 F. 2d 1162 (9th Cir. 1979).

Petitioner seeks to avoid the consequence of its compliance with the summons by contending (Pet. 9) that the issue in this case is "capable of repetition, yet evading review." It therefore urges that its compliance did not render this case moot. But the line of cases relied upon by petitioner, and the amicus American Institute of Certified Public Accountants[2] turns on the fact that "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration." *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975). Here, petitioner had the power to keep the dispute alive simply by not producing the documents. However, once it produced the documents, there was no longer any dispute between the parties. The case is therefore controlled by *Brownlow* v. *Schwartz*, 261 U.S. 216 (1923), where the Court held an appeal to be moot because the appellant had complied with the lower court order. See also *American Book Co.* v. *Kansas*, 193 U.S. 49, 52 (1904).[3]

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[2]*Southern Pac. Terminal Co.* v. *ICC*, 219 U.S. 498 (1911); *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976); *United States* v. *New York Telephone Co.*, 434 U.S. 159 (1977); *In re United States*, 616 F. 2d 1122 (9th Cir. 1980); *In re United States*, 610 F. 2d 1148 (3d Cir. 1979); *Roe* v. *Wade*, 410 U.S. 113, 125 (1973); *Doe* v. *Bolton*, 410 U.S. 179 (173); *United States* v. *Frumento*, 552 F. 2d 534, 536-541 (3d Cir. 1977) (en banc).

United States Parole Commission v. *Geraghty*, No. 78-572 (Mar. 19, 1980), upon which petitioner relies (Pet. 12), is likewise distinguishable. There, an attack upon the Commissioner's parole guidelines was not rendered moot by the plaintiff's release from confinement (an event over which he had no control) because the suit was a class action.

[3]Compare, however, *United States* v. *Friedman*, 532 F. 2d 928 (3d Cir. 1976). There, the court concluded that a summons enforcement

2. Petitioner further contends (Pet. 13) that this case is still a live controversy because it was compelled by court order to comply with the summons. As petitioner sees the matter, it should not be placed in the position of defying the district court and risking contempt in order to obtain review. But this Court rejected much the same argument in *Brownlow* v. *Schwartz*, *supra*, 261 U.S. at 218, observing that "[t]he motive of the [complying] officer * * * is quite immaterial. We are interested only in the indisputable fact that his action * * * has left nothing to litigate. The case being moot, further proceeding upon the merits can neither be had here nor in the court of first instance." Compare *DeFunis* v. *Odegaard*, 416 U.S. 312, 316-317 (1974).

Moreover, despite petitioner's argument to the contrary (Pet. 13-15), the requirement that a party risk contempt to insure that the issue does not become moot is well established. See *Cobbledick* v. *United States*, 309 U.S. 323 (1940); *United States* v. *Ryan*, 402 U.S. 530 (1971); *In re Grand Jury Subpoena, May 1978 at Baltimore*, 596 F. 2d 630 (4th Cir. 1979). Indeed, in *In re Attorney General of United States*, 596 F. 2d 58, 62 (2d Cir.), cert. denied,

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proceeding did not become moot even after compliance because a ruling by the court of appeals that the summonses were unenforceable on the ground that they were issued solely for a criminal prosecution could affect the possible use of the summoned material in any subsequent criminal or civil proceeding. While we believe that such contentions are more properly presented in whatever criminal or civil case may subsequently ensue rather than in the summons enforcement proceeding, the fact that there was "incomplete compliance with the court's order" (532 F. 2d at 931) with respect to some of the summoned evidence at issue in *Friedman* serves to distinguish that case (*ibid.*). See also *Vesco* v. *SEC*, 462 F. 2d 1350 (3d Cir. 1972), in which the Third Circuit dismissed as moot an appeal seeking to enjoin the enforcement of an SEC subpoena with which the appellant fully complied.

444 U.S. 903 (1979), the court rejected the government's argument that it would be unseemly to require the Attorney General to be bound by the traditional requirement of standing in contempt to obtain review of a court order to produce documents in his possession. There is accordingly no reason to relieve petitioner, a private accounting firm, of the traditional prerequisite for obtaining appellate review of a court order to produce accountant's workpapers which are not subject to any evidentiary privilege.[4] See *Couch* v. *United States*, 409 U.S. 322, 335 (1973).

There is no basis for petitioner's further contention (Pet. 17-18) that requiring it to resist compliance with the district court's order is an "undesirable procedure" (*id.* at 17). This case arises out of an investigation by the Internal Revenue Service of Good Hope Industries. The same policies calling "for expedition in the administration of the criminal law" that "justif[y] putting one who seeks to resist the production of desired information to a choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal" (*United States* v. *Ryan*, *supra*, 402 U.S. at 533) are equally applicable here. The evidence sought by the Service may or may not yield information that will result in the determination of deficiencies. The production of that evidence should not be impeded by piecemeal reviews that serve only to delay the ultimate conclusion of the tax investigation. As this Court observed in *United States* v. *Nixon*, 418 U.S. 683, 690 (1974), the requirement of

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[4]Contrary to petitioner's argument (Pet. 26), there is no connection between this case and the work-product issue presented in *The Upjohn Co.* v. *United States*, No. 79-886 (argued Nov. 5, 1980). The work-product doctrine of *Hickman* v. *Taylor*, 329 U.S. 495 (1947), recognized a qualified privilege for certain materials prepared by an *attorney* acting for his client in anticipation of litigation.

submitting to contempt "promotes judicial efficiency and hastens the ultimate termination of litigation." The rule requiring petitioner to risk contempt likewise hastens the ultimate termination of a tax investigation by discouraging routine protracted challenges to summons enforcement orders and thereby limiting such litigation to cases where the summoned party believes that the claims are meritorious. In sum, if petitioner believes that its claim on the merits will be vindicated, it should be willing to risk the possibility of contempt to obtain review of those claims.[5]

3. Finally, contrary to petitioner's argument (Pet. 13), the decision below does not conflict with *In re Special April 1977 Grand Jury*, 581 F. 2d 589 (7th Cir. 1978). There, the court permitted a post-compliance appeal from an order enforcing grand jury subpoenas served on members of the staff of the subject of the investigation. But as the court of appeals pointed out, that case is distinguishable because the third parties directed to comply had "no strong interest in resisting the subpoenas to expose themselves to contempt by refusing to comply" (Pet. App. A-6).[6] In those circumstances, denial of

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[5]Since petitioner's compliance with the district court's order prevented the court of appeals from reaching the merits of its claim that the tax accrual workpapers were not relevant, there is no basis for petitioner's argument (Pet. 28) that the decision below conflicts with *United States* v. *Coopers & Lybrand*, 550 F. 2d 615 (10th Cir. 1977).

[6]The Seventh Circuit in *In re Special April 1977 Grand Jury* also relied upon this Court's decisions in *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976) and *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978), stating that "the Supreme Court has not required litigants to subject themselves to contempt or criminal sanction" (581 F. 2d at 591) in order to meet the "evading review" aspect of the mootness test. But, as the court of appeals correctly noted (Pet. App. A-6 to A-7), both of those cases involved prior restraints on arguably protected speech. Here, the imposition of sanctions on petitioner for refusal to produce the summoned evidence would involve no such prior restraint upon speech.

immediate review would render impossible any review by the subject of the investigation who would be "powerless to avert the mischief of the order." *Perlman* v. *United States*, 247 U.S. 7, 13 (1918). Here, by contrast, the summons was directed at petitioner itself who has asserted that its professional functions would be impaired by disclosure (see Pet. 20). Hence, as the court of appeals correctly concluded, "to the extent that the issue sought to be reviewed is of such assertedly vital importance to both Andersen and the industry, it does not seem too draconian to insist on resort to contempt in order to preserve the issue for appeal" (Pet. App. A-8).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General

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